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NO. .....

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THEODORE KOEHLER, Warden,

Petitioner,

v

TILDEN N. ENGLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this case presents an important question of federal law with regard to the applicability of *Cupp* v *Naughten*, 414 US 141 (1973), to jury instructions allegedly violative of *Sandstrom* v *Montana*, 442 US 510 (1979).

II. Whether this case presents a significant question of federal law with respect to the application of the *Chapman* v *California*, 386 US 18 (1967), harmless error test to allegations of constitutional defect in jury instructions.

III. Whether this case presents an important federal question with regard to the applicability of *Wainwright* v *Sykes*, 433 US 72 (1977), where there is no objection at trial or on direct appeal to the jury instructions at issue.

IV. Whether the extent to which *Sandstrom* v *Montana*, 442 US 510 (1977), applies to cases tried prior to its decisional date presents an important question of federal law which has produced conflict in the courts of appeals.

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In The

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THEODORE KOEHLER, Warden,

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TILDEN N. ENGLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Respondent Engle was convicted of first degree premeditated murder in July, 1973, after a jury trial in the Recorder's Court for the City of Detroit. He was thereafter sentenced to life imprisonment without parole. The Michigan Court of Appeals affirmend Respondent's conviction and the Michigan Supreme Court thereafter denied leave to appeal. *People* v *Engle*, 61 Mich App 628(1975), *lv den* (without opinion), 402 Mich 929 (1978). The same courts thereafter denied applications for leave to appeal. *People* v *Engle*, unpublished order dated August 30, 1978 (Docket No. 78-2485); *lv den* (without opinion), 406 Mich 870 (1979). Federal District Judge Douglas W. Hillman of the Western District of Michigan denied Respondent's petition for a writ of habeas corpus in a written opinion dated May 4, 1982. Appendix 1a. On Respondent's appeal from Judge Hillman's decision, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case with instructions to grant the writ. *Tilden N. Engle* v *Theodore Koehler*, ... F2d .... (No. 82-1470, filed May 9, 1983). Appendix 14a.

JURISDICTION

Petitioner seeks review of the Court of Appeals opinion filed May 9, 1983. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

MCL 750.316; MSA 28.548:

> All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCL 769.26; MSA 28.1096:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Michigan General Court Rules 1963, 516.2:

> Objections. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the

grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Respondent Engle was found guilty of first degree murder in the December 7, 1972 shooting death of Regis Lantzy at a Detroit automobile plant.

Respondent did not dispute the homicide at trial, but instead presented a defense of temporary insanity.

Trial evidence established that Respondent had been laid off from his assembly line job on December 4, 1972. (245).[1] He received information that his foreman, the decedent, had precipitated his event. (250).

Respondent returned to the plant at approximately 9:00 p.m. on December 7, 1972. (I, 11-12). He informed his nephew, Renus Engle, that "he was going to kill a guy". (I, 13). Renus Engle described Respondent as crying and with a nervous pitch to his voice. (I, 21). He also stated that Respondent was drinking but not drunk. (I, 28).

At approximately 9:35 p.m. Respondent entered foreman Lantzy's office where he encountered clerk Donald Ambrose. Respondent asked for Lantzy. Ambrose advised Respondent that Lantzy was temporarily absent but was to return shortly. Ambrose offered to find Lantzy. Respondent, however, said "I'll go find him" and then left. (38-41). Ambrose described Respondent as appearing troubled with a strange look in his

---

[1] Arabic numbers refer to consecutively numbered pages of the trial transcript contained in volumes two through five. A Roman numeral one designates pages appearing in the separately numbered first volume of the trial transcript.

eyes, but also coherent and polite. (40-42; 56). Ambrose did not detect any odor of alcohol on Respondent's breath. (56).

A short time later, at approximately 9:45 p.m., Cornelius Matthews and William Richardson saw Respondent talking to Lantzy. (I, 54; 20). Respondent then shot Lantzy who began to run. (I, 55; 21-22). Respondent shot again and Lantzy fell. Respondent shot Lantzy twice more, stood over the body and then walked away. (I, 55-56). Another worker, Charles Yates, also witnessed a portion of the attack. (I, 70-71).

Respondent returned to Ambrose's office and stated that he had killed Lantzy because the latter had "fucked over him". (42-43). When plant security officer Samuel Mays arrived at the office, Respondent gave him the gun and admitted shooting Lantzy. (66, 76). Mays detected an odor of alcohol on Respondent's breath but found Respondent coherent. (67).

Detroit police officer Richard Ren arrived next, took custody of Respondent and advised him of his rights. (88-90). Neither Ren nor his partner, Officer Onorio Catenacci, detected alcohol odor and both observed that Respondent was very calm. (94-95; 127). Respondent described the shooting in detail to Ren. He then stated that he had ceased firing because he believed Lantzy was dead and he did not want to kill anyone else. (106-107). Respondent gave a written version of his admissions to Detroit Police Officer Daniel Nold on the following day. (159-160; 161-162).

Respondent testified that he had no memory of the incident except a nightmarish image of Lantzy with blood gushing from his mouth. (258; 311-312). He claimed he started drinking after his layoff on December 4 and had taken four librium pills on December 7. (257).

Dr. Mary Ansley, a psychiatrist, testified for Respondent and

opined that Respondent lacked behavioral control on the night in question due to a mental disorder. (351-359). In rebuttal psychiatrist Ervin Edgar testified that, though Respondent was a chronic alcoholic, he had not experienced a disassociative reaction or an irresistible impulse and knew right from wrong when he killed Lantzy. (415-419, 434).

Aside from general instructions on the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt and the elements of the offense, the trial court charged the jury as follows on the issues of malice and intent:

> Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, malice is implied from any deliberate and cruel act against another person, however sudden.
>
> Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.
>
> We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts. It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may

properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or not the wounds were wounds caused by holding the weapon directly against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt.

670-671.

With regard to the defense of insanity the court stated as follows:

Ladies and gentlemen you have heard evidence in this case; you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at the time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident.

677.

There were no objections to the court's instructions.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WITH REGARD TO THE APPLICABILITY OF CUPP v NAUGHTEN, 414 US 141 (1973), TO JURY INSTRUCTIONS ALLEGEDLY VIOLATIVE OF SANDSTROM v MONTANA, 442 US 510 (1979).

In this case the Court of Appeals purported to evaluate an alleged *Sandstrom* violation in accordance with the dictates of *Cupp* v *Naughten*, 414 US 141 (1973). The court, however, effectively read the instructions at issue in "artificial isolation" and found constitutional error.

The jury instruction condemned in *Sandstrom* was devoid of ameliorative, explanatory or curative language. This court properly noted that general admonitions as to burden of proof and reasonable doubt were not "rhetorically inconsistent", id., 442 US 518-519, n. 7, with this charge and, therefore, could not have mitigated its erroneous impact. There was simply no other context for appellate review in *Sandstrom*.

This case presents an entirely different situation. Here the court gave the presumption of intent as a "rule of thumb". The court then explained to the jury that they must determine intent beyond a reasonable doubt based on a variety of enumerated factors. Petitioner submits that the complete instruction on intent in this case was rhetorically inconsistent with the concept of a conclusion presumption or a shift of the burden of proof to the defendant.

In analogous circumstances, Courts of Appeals in other circuits have refused to find constitutional error in the presence of qualifying or explanatory language associated with a *Sand-*

strom-type instruction. See *Brayboy* v *Scully*, 695 F2d 62 (2nd Cir, 1982); *Niziolek* v *Ashe*, 694 F2d 282 (1st Cir, 1982); *Rock* v *Coombe*, 694 F2d 908 (2nd Cir, 1982), *cert den*, ... US .... (1983). The Court of Appeals here found these cases and others factually distinguishable and declined comment on their correctness. *Engle* v *Koehler*, *supra*, sl. op., p. 8, n. 4. This Court should grant certiorari to provide the necessary guidance for proper application of *Cupp* v *Naughten* to alleged *Sandstrom* errors.

II.

THIS CASE PRESENTS A SIGNIFICANT QUESTION OF FEDERAL LAW WITH RESPECT TO THE APPLICATION OF THE CHAPMAN v CALIFORNIA, 386 US 18 (1967), HARMLESS ERROR TEST TO ALLEGATIONS OF CONSTITUTIONAL DEFECT IN JURY INSTRUCTIONS.

The Court of Appeals in this case noted that this Court is equally divided with respect to the appropriate harmless error test for *Sandstrom* violations. *Connecticut* v *Johnson*, 103 S Ct 969 (1983). One plurality would carefully examine the weight of the prosecutor's case while the other would find error unless the accused affirmatively conceded the issue of intent. The Court of Appeals in this case chose to apply a fundamentally different harmless error test. *Engle* v *Koehler*, sl. op., p. 9-10. See *Conway* v *Anderson*, 698 F2d 282, 284 (6th Cir, 1983).

The test applied in the case at bar does not focus on either the strength of the prosecution's case or the nature of the constitutional error. Instead, the only inquiry is whether the defendant's *mens rea* was an issue in the case. Thus, if the defendant places his mental state in issue, a *Sandstrom* error can never be held harmless.

Petitioner submits that this harmless error test represents a departure from *Chapman* v *California, supra.* The *Chapman* test, properly understood, endeavors to evaluate the impact of constitutional error in light of the case as a whole. The *Engle/Conway* test studiously avoids all the circumstances of the case save one—the defense raised at trial.

It is imperative that this Court grant certiorari to define the appropriate harmless error test applicable to *Standstrom* violations.

III.

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION WITH REGARD TO THE APPLICABILITY OF WAINWRIGHT v SYKES, 433 US 72 (1977), WHERE THERE IS NO OBJECTION AT TRIAL OR ON DIRECT APPEAL TO THE JURY INSTRUCTIONS AT ISSUE.

There was no contemporaneous objection at trial to the jury instructions later claimed to violate the dictates of *Sandstrom* v *Montana, supra.* Moreover, Respondent failed to raise the *Sandstrom* issue on his direct appeal. *People* v *Engle,* 61 Mich App 628 (1975).

Under Michigan law, a contemporaneous objection is necessary to preserve a claim of error in jury instruction for appellate review. GCR 1963, 516.2; MCL 769.26; MSA 28.1096. Moreover, the law of the case doctrine generally applies to preclude consideration of issues presented for the first time on successive appeals. *People* v *Tubbs,* 64 Mich App 341 (1975), (concurring opinion); *People* v *Bergin,* 63 Mich App 526 (1975). Respondent here did not raise his claim that the trial court's instructions shifted the burden of proof on the issue of intent until he filed a delayed application for leave to appeal in 1978. In a response the prosecutor vigorously argued

that Respondent's previous failure to object at trial or on direct appeal precluded review. See *Martinez* v *Harris*, 675 F2d 51 (CA 2, 1982). The Michigan Court of Appeals summarily denied his application and the Michigan Supreme Court subsequently declined review.

The Court of Appeals did not address the argument that *Wainwright* v *Sykes*, 433 US 72 (1977), precluded habeas corpus review in these circumstances. The court instead assumed that the Michigan Supreme Court did not enforce contemporaneous objection rules against failures to object to *Sandstrom* instructions. *Engle* v *Koehler*, sl. op. p. 6, citing *People* v *Wright*, 408 Mich 1, 30, n. 13 (1980).

Wright, however, clearly does not resolve the issue of whether a procedural default precluded review in the case at bar. The *Wright* court itself recognized that their decision to ignor the state's contemporaneous objection rule was a departure from prior practice. 408 Mich at 30, n. 13. As the appeals in this case had concluded some time prior to *Wright*, it is pure speculation to surmise an anticipatory application of this departure.[2] In any event, *Wright* clearly did not address the effect of a failure to raise instructional error on direct appeal, which ommission represents a distinct procedural default. Petitioner submits that a Federal Court on habeas corpus review has a duty to determine whether the state court has applied a procedural default rule even where the state court decisions are unclear in this regard. See *County Court of Ulster* v *Allen*, 442 US 140, 148-154 (1979). Had such an inquiry occurred in this case Petitioner submits that the record would support a conclusion that procedural default was a "substantial basis" for denial of Respondent's

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[2]

It is now clear that Michigan requires preservation of *Sandstrom*-type errors in circumstances like those presented in this case. *People* v *Woods*, 416 Mich 581, 621 (1982).

claim. See *Hockenberry* v *Sowders*, 620 F2d 111, 115 (CA 6, 1980).

In *Engle* v *Isaac*, 456 US 926; 102 S Ct 1558; 71 L Ed 2d 783 (1982), this Court emphasized the importance of federal deference to the state's decision to enforce its procedural rules. Whether a state has enforced such a rule in a particular case represents a question of fact for determination through litigation. Petitioner submits that a presumption of nonapplication violates the spirit if not the letter of *Sykes* and *Engle*.

This Court should grant certiorari in order to precisely define the circumstances which will trigger application of the *Wainwright* v *Sykes* doctrine.

IV.

THE EXTENT TO WHICH SANDSTROM v MONTANA, 442 US 510 (1977), APPLIES TO CASES TRIED PRIOR TO ITS DECISIONAL DATE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS PRODUCED CONFLICT IN THE COURTS OF APPEALS.

The Court of Appeals applied *Sandstrom* v *Montana*, *supra*, retroactively in the case at bar. *Engle* v *Koehler*, sl, op. p. 5, n. 1; see also *Burton* v *Bergman*, 649 F2d 428 (6th Cir, 1981), vacated and remanded on other grounds, 102 S Ct 2026 (1982). The Eighth Circuit has also applied *Sandstrom* retroactively. *Dietz* v *Solem*, 640 F2d 126 (8th Cir, 1981). In *United States* v *Spiegel*, 604 F2d 961 (5th Cir, 1979), *cert den*, 446 US 935 (1980), however, the Fifth Circuit declined to afford full retroactivity to *Sandstrom*-type errors. In *People* v *Woods*, 416 Mich 581 (1982), the Michigan Supreme Court analyzed the retroactivity of *Sandstrom* pursuant to the principles set forth in *Stovall* v *Denno*, 388 US 293 (1967) and *Linkletter* v

Walker, 381 US 618 (1965), and determined that *Sandstrom* should not apply retroactively unless the case was pending on direct appeal when *Sandstrom* was decided and the issue had been properly raised and preserved for review. 416 Mich at 621.

This Court should grant certiorari and address the question of *Sandstrom's* retroactivity.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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UNITED STATES OF AMERICA
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TILDEN N. ENGLE, Petitioner, -vs- THEODORE KOEHLER, Warden, Marquette House of Correction and Branch Prison, Defendant.	Case No. M80-28 CA

OPINION

This is a case in which petitioner challenges the validity of his state court conviction for first degree murder. Petitioner was convicted in 1973 for the December 7, 1972, slaying of Regis Lantzy. Petitioner has exhausted his state remedies, and in his petition to this court for a writ of habeas corpus under 28 U.S.C. § 2254, argues that he was denied due process of law in his state trial. Petitioner contends that certain instructions in the judge's charge to the jury shifted the burden of proof on the element of intent in contravention of the rule set forth in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

Petitioner is in the custody of Respondent at the Marquette State Prison, where he is serving a life sentence as a result of his conviction. Respondent has moved for dismissal of the petition, or in the alternative, for summary judgment. Fed.R. Civ.P. 12(b) (6), 56(b). The case was referred to United States Magistrate Stephen W. Karr. In his Report and Recommenda-

tion, Judge Karr found that petitioner's constitutional rights were not violated in the state proceeding. Specifically, Judge Karr found the instructions given by the trial judge in this case distinguishable from those condemned in *Sandstrom*, and further concluded that even assuming the instructions were erroneous, the error was harmless beyond a reasonable doubt. For the reasons stated below, I concur with Magistrate Karr's findings and, therefore, accept his recommendation that respondent's motion for dismissal be granted.

I.

Petitioner contends he was denied due process of law because the trial court's instructions relieved the prosecution of its burden to prove all the elements of the first degree murder charge. Specifically, petitioner argues that the jury was instructed that it could presume from petitioner's act of shooting the decedent that he intended his victim's death.

The trial court instructed the jurors that petitioner was charged with first degree murder, and that to prove the crime, the state must show beyond a reasonable doubt that the killing was premeditated and with malice. The jurors were also told that they could find the petitioner guilty of second degree murder, which required proof of the same elements as first degree murder, absent premeditation. Further, the jurors were told that they might find petitioner guilty of manslaughter, which the court defined as "the intentional taking of life without either premeditation or malice." The court's instructions left the jurors with the clear message that in order to prove either of these three charges, the state must prove beyond a reasonable doubt "that defendant intended to cause death."

After the court issued the general instructions on homicide, it read to the jurors the following instructions which include those forming the basis of the instant appeal:

"Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to a particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, *malice is implied from any deliberate and cruel act against another person, however sudden.* (Emphasis supplied.)

"We of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but *the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his act. It is somewhat like the old saying that actions speak louder than words.* Therefore in determining whether there was an intent to kill, the jury may properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

"The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or not the wounds were wounds caused by holding the weapon directly against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt."

II.

In *Sandstrom v. Montana*, *supra* at 515, the Court found a violation of due process when the jurors in a murder case were told that "[*t*]*he law presumes* that a person intends the ordinary consequences of his voluntary acts." (Emphasis supplied.) The jurors in that case were not told that they had a choice, or that they might infer from his acts that the defendant intended a particular consequence. They were told only that the law presumes it. *Id.*

Due process was violated because a reasonable juror could have concluded that he was directed to find against the defendant on the element of intent or alternatively, that the defendant was obligated to prove that he lacked the requisite mental state. *Id.* at 524. Either of these results relieves the state of its burden to prove every element of the crime, thus depriving the defendant of due process of law. *Id.*

On the other hand, the Court has stated that:

> "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction."

Chapman v. *California*, 386 U.S. 18, 22 (1967). In *Chapman*, the Court said that a constitutional error is harmless only when the beneficiary of the error (here, the state) can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. In other words, where "there is a reasonable possibility that the evidence complained of might have contributed to the conviction," its admission is not harmless. *Fahy v. Connecticut*, 375 U.S. 85 (1963).

In *Chapman*, petitioners challenged an instruction in which the court told the jurors that they may draw adverse inferences from the failure of the defendants to testify. The Court said that it was "completely impossible for us to say that the state has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions." *Chapman, supra* at 26.

Therefore, this court must answer two questions. First, it must be determined whether a reasonable juror in this case could have interpreted the challenged instruction either to direct him to find against the petitioner on the element of intent, or to place the burden of proving lack of intent on petitioner. If the instruction is found constitutionally infirm, it must then be determined whether the state has proven beyond a reasonable doubt that the challenged instruction did not contribute to the first degree murder verdict.

III.

A jury instruction is not constitutionally deficient if it tells the jury it may draw reasonable inferences from a defendant's behavior. The *Sandstrom* instruction on presumed intent was condemned by the Court because it could have left a reasonable juror with the impression that he had no choice but to presume the defendant intended the consequences of his actions. *Sandstrom, supra* at 515.

Indeed, the Court acknowledged that a reasonable juror could have viewed the instruction as merely permitting the presumption rather than requiring it. However, the Court said:

> "[T]he fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sand-

> strom's jurors actually did proceed upon one or the other of these latter (erroneous) interpretations."

Id. at 519.

Under *Sandstrom*, therefore, an instruction violates due process if any reasonable juror could interpret it as directing a finding that the defendant intended to kill his victim. Applying this test to petitioner's case, I conclude that no reasonable juror could have interpreted the court's instructions as a directive to find against the defendant on the issue of intent. The instructions given at petitioner's trial clearly vested in the jury the authority to decide for themselves whether defendant possessed the requisite criminal intent to justify a homicide conviction. For this reason, I accept the Magistrate's recommendation and grant respondent's motion for summary judgment.

Petitioner presents a well-reasoned and comprehensive attack upon the Magistrate's report. The argument is based largely on the similarities existing between *Sandstrom* and petitioner's case, and the court concedes the two cases are remarkably similar. However, petitioner fails to note a crucial difference between the *Sandstrom* instructions and those given in the instant case. In *Sandstrom*, the Court found that the jurors were not told that they had a choice whether to presume defendant's intent to kill. *Sandstrom*, *supra* at 515. In petitioner's case, on the other hand, no reasonable juror could have concluded from the court's instructions that he had no choice but to presume the requisite mental state from the nature of the act itself. A reading of the instructions in their entirety compels this conclusion.

For a juror to have given the challenged instruction an improper effect, he would necessarily have had to ignore numerous other instructions read by the judge. These instructions expressly placed in issue whether petitioner possessed

the intent to kill and could have left any reasonable juror with only one impression: I must decide whether Mr. Engle intended to kill Mr. Lantyz.[1]

For instance, immediately after giving the challenged instruction that "a person is presumed to intend the natural consequences of his acts . . .," the judge told the jurors that "in determining whether there was an intent to kill" they may consider several factors, including petitioner's use of a deadly weapon, the manner of its use and the number and location of the wounds. The effect of these statements was to tell the jurors that they may infer from the circumstances of the killing that the requisite intent was present, but that a determination of the intent issue was for the jurors to make.

---

[1]

The Sixth Circuit accepts the rule that a challenged instruction must be viewed "not in artificial isolation . . . but . . . in the context of the overall charge." *Burton v. Bergman*, 649 F.2d 428, 431 (6th Cir. 1981) quoting *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). However, in *Sandstrom*, the Court warned against finding harmless an otherwise improper instruction simply because the rest of the charge was constitutionally sound. Where the supposedly curative instructions are not "rhetorically inconsistent with a conclusive or burden-shifting presumption," said the Court, the contaminating effect of the erroneous charge may still be present. *Sandstrom*, *supra* at 519, n. 7. For example, the Court noted that if the presumption were viewed as conclusive, a reasonable juror could believe that although intent must be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt. *Id.*

However, the trial court's instructions on alcohol and insanity, discussed *infra*, are "rhetorically inconsistent" with another instruction that tells the jury they must presume intent to kill from the proof of the act and its natural consequences. This inconsistency and the clear import of numerous instructions placing the intent determination on the shoulders of the jurors virtually eliminate any risk that a reasonable juror could believe he must presume intent to kill from the fact that petitioner shot the victim to death.

The presence or absence of intent to kill was placed in issue once again moments later when the trial court instructed the jury that:

> "In a case of this kind if there is evidence introduced that the defendant was, in fact, intoxicated at the time it is alleged he committed the crime, it should be considered by you for the purpose of determining whether the accused, at the time of the offense, was capable of forming a wilful, deliberate and premeditated purpose to take life and if in this case, although you believe beyond a reasonable doubt that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that at the time he inflicted the fatal injury he was deeply intoxicated, he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, or if you entertain a reasonable doubt as to these things, then such killing would be, at most, murder in the second degree or manslaughter."

At trial, petitioner raised the defense of intoxication. He claimed that he was temporarily insane at the time of the shooting, partially due to the influence of alcohol. With the instruction quoted above, the court clearly told the jurors that when such a defense is raised and supported by some evidence, they must consider the effect of the alcohol on the mental state of the defendant at the time of the alleged criminal act. Petitioner does not challenge these instructions. However, any juror who might have relied on the challenged instruction to find that petitioner intended to kill his victim would have also had to ignore the instruction on alcohol. Conversely, no juror could give the charge on alcohol its due

consideration without presuming that petitioner's mental state during the killing was an issue before the jury.[2]

A similar result obtains upon examination of the temporary insanity instructions given by the court:

> "Now, the defendant has also urged the defense of insanity, and, ladies and gentlemen, it must appear in this case that the defendant is a man of sound mind. . . .
>
> "Ladies and gentlemen, you have heard evidence in this case; you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at that time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident. Did he know what he was

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[2]

The court went on:

> "What this instruction is telling you is this: if a man becomes voluntarily drunk, he cannot claim that as a defense to a crime unless he has become intoxicated to such degree that he cannot form an intent if the crime for which he is charged is a crime which requires an intent, a specific intent, and the crime of murder in the first degree requires the intent to kill – premeditation – and, therefore, if a person was, in fact, so intoxicated that it was impossible for him to have any intention or any plan to kill somebody, while he might be guilty of murder in the second degree or guilty of manslaughter, he could not be guilty of murder in the first degree for lack of premeditation."

By this instruction the judge strongly suggests, if he does not expressly state that the jury must decide whether petitioner was "so intoxicated that it was impossible for him to have any intention . . ." to kill. By this instruction the judge gave effect to petitioner's intoxication defense, and informed the jurors that they were at liberty to decide, indeed duty bound to decide, whether at the time of the shooting petitioner's mental state and his ability to formulate murderous intent had been affected in any way by intoxication. This instruction is plainly inconsistent with a mandate to find against petitioner on the issue of intent.

doing; whether it was right or wrong? And if he did, then did he know or have the power, the willpower, to resist the impulse occasioned? . . .

"Now, in many criminal cases no question of insanity is ever raised because the Prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts. The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt of insanity, the State has the burden of proving sanity beyond a reasonable doubt.

"The defendant in this case alleges that at the time of the shooting he was suffering from so-called temporary insanity, rendering him not responsible for the alleged shooting.

"What defense attorneys mean by temporary insanity is usually not mental disease at all but merely a strong, emotional agitation, called dissociated [sic] reaction which momentarily overwhelms the consciousness in a sane person. A state of dissociation may arise in which the person carries out a series of acts of which he later has little or no recollection. Where this can be proved it would constitute a defense."

This instruction clearly places before the jury the issue of petitioner's mental state during the commission of the murder. The trial judge, by issuing the challenged instructions, meant merely to tell the jurors they may infer from the act that a given mental state was present. If the judge had meant to impose a conclusive presumption upon the jury as to petitioner's

intent, he would not have given the instructions on alcohol or insanity. For a juror to have given the challenged instructions the effect denounced in *Sandstrom*, that juror would have had to ignore the clear import of the alcohol and insanity instruction.[3]

In short, the effect of these instructions was to vest in the jurors the choice they might have been denied in *Sandstrom*, that is, to determine whether the defendant was capable of forming, and indeed did form, the requisite mental state to render him guilty of homicide. I do not deny that one of petitioner's jurors might have taken the "actions speak louder than words" instruction to mean that the mere act established the charge and that he was being directed to so find. However, any juror who on the basis of these instructions alone concludes he has no choice but to presume intent from the act is not approaching his fact finding duties rationally. And, regrettable though it may be, *Sandstrom* does not protect a defendant from an unreasonable juror.[4]

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[3]

It is undisputed that petitioner shot Lantzy to death. It is clear, therefore, that petitioner is guilty of homicide unless he was temporarily insane. Petitioner does not challenge the insanity instructions. He does not contend that he was deprived of the benefit of placing the insanity defense before the jury. Rather, he argues that because of the challenged instructions "the jurors could have concluded that the requisite intent was therefore implied and established beyond a reasonable doubt and that they need not go further and consider whether Petitioner actually entertained an intent to kill . . . or whether his intoxication and mental state were such as to preclude or mitigate such an intent." If this were the case, then what concievable purpose or significance could a reasonable juror attach to the alcohol and insanity instructions?

[4]

Protection from unreasonable jurors is afforded by *Jackson v. Virginia*, 443 U.S. 307 (1979), where the Court held that in a federal habeas corpus proceeding, a district court may reverse state factual findings if it can be said that no reasonable trier of fact could have reached such findings. The *Jackson* standard is applicable when a habeas petition

challenges a conviction on the basis of insufficient evidence. For obvious reasons, no such challenge is made here. The court also concedes that it "cannot tell whether this [objectionable] charge was applied by the jury" in finding against the petitioner on the issue of intent *United States v. Williams*, No. 80-5268 (6th Cir. November 30, 1981). However, no reasonable juror would have applied the charge without consideration to the other instructions which clearly left the jury free to find for petitioner on the issue of intent. *See, Burton v. Bergman* note 1, *supra*.

Since I conclude that the judge's instructions in this case did not run afoul of the due process clause, I do not reach the question whether the instructions constituted harmless error.

Respondent's motion for summary judgment is granted and the case is dismissed.

Douglas W. Hillman /s/

Douglas W. Hillman
District Judge

Dated: May 10, 1982.

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TILDEN N. ENGLE, Petitioner, -vs- THEODORE KOEHLER, Warden, Marquette House of Correction and Branch Prison, Defendant.	Case No. M80-28 CA

May 11 2:50 PM '82
CLERK, U.S. DIST. COURT—WESTERN DIST. OF MICH.
BY .....

ORDER

The court has reviewed the Report and Recommendation filed by the United States Magistrate in this action, and has given new consideration and made a de novo determination of those portions to which specific objection has been made, and pursuant to the opinion filed this date,

IT IS ORDERED that the Report and Recommendation of the Magistrate is approved and adopted as the opinion of the court.

IT IS FURTHER ORDERED that the petition for a writ of habeas corpus is hereby dismissed.

Douglas W. Hillman /s/

Douglas W. Hillman
District Judge

Dated: May 10, 1982.

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1470
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TILDEN N. ENGLE, *Petitioner-Appellant*, v. THEODORE KOEHLER, Warden, *Respondent-Appellee*.	On Appeal from the United States District Court for the Western District of Michigan.

Decided and Filed May 9, 1983

Before: CONTIE and KRUPANSKY, Circuit Judges, and CELEBREEZE, Senior Circuit Judge.

CONTIE, Circuit Judge. Tilden Engle appeals from a district court order dismissing a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Engle was convicted in Michigan in July, 1973 of first degree murder and was sentenced to life imprisonment without possibility of parole. The sole issue is whether the trial court's jury instructions on the issues of malice and intent constitute reversible error under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). We reverse the judgment of the district court.

I.

The facts are undisputed. The petitioner, a resident of Detroit, was laid off from his job with Chrysler Corporation on December 4, 1972. Engle suffered from alcoholism and claims that he drank heavily between December 4 and De-

cember 7, the date of the events in question. On that date, Engle returned to the plant shortly after 9:00 p.m. and told Renus Engle, a nephew who also worked for Chrysler, that he was going to kill someone. The nephew testified that the petitioner had tears in his eyes and had a nervous pitch in his voice, a condition in which Renus had never seen his uncle. Renus also stated that although the petitioner had been drinking, he was not drunk.

The defendant then sought Regis Lantzy, who Engle thought was responsible for the layoff. The petitioner went to the office of Donald Ambrose, clerk, and asked for Lantzy. Ambrose told Engle that Lantzy was not present and the defendant stated that he would find him. Ambrose testified that Engle "didn't look quite right — he looked like something was troubling him" and "I had never seen the man before and he looked so strange."

Shortly thereafter, Engle found Lantzy in the plant. In front of several workers, Engle drew a gun and shot him. Lantzy tried to run but the petitioner shot him several more times. Engle briefly stood over the body and then returned to Ambrose's office where he surrendered to a security guard. Ambrose testified that he asked who had been shot and the defendant responded, "Regis Lantzy." When asked why he had killed Lantzy, Engle said, "because he fucked over me." The security guard testified that the petitioner further stated that Lantzy had been shot because "a man can only take so much, he's dead, he ain't going to bother nobody any more" and "I am a man; nobody wants to be walked over by nobody." The guard stated that he could smell alcohol on the petitioner's breath. Two police officers who later arrived on the scene did not detect the odor of alcohol.

On December 8, Engle gave the following written statement to the police:

> I was laid off from Chrysler on Monday, December 4, 1972. Tuesday, Wednesday and Thursday, I drank over a fifth of whiskey each day. Thursday night I took my gun from my bedroom and put it in my — pocket. It was about 9:00 p.m. I knew lunch at Chrysler was from 9:00 to 9:30 p.m. I went to Chrysler's and walked in with some other people who had been out to lunch. I went to Department 9130. I stood in the back and watched for Lantz [sic]. When I saw Lantz I walked towards him and met him. He started to say something like "what the hell are you doing here," or something like that. I didn't let him get it all out. I just pulled the gun out and he said "oh no," and then I shot him twice. He turned and ran and I shot him in the back. He fell and I shot him again. I don't know if I hit him. I saw blood gushing from his mouth and I knew he was dead.
>
> [s/Tilden Engle.]

At trial, Engle's sole defense was temporary insanity because of the effects of alcohol, drugs and dissociative reaction, a temporary mental disorder which is often accompanied by memory loss. Engle testified that he had consumed four librium pills together with large amounts of whiskey on December 7. He further stated that he remembered nothing between the time he was home drinking and the moment when he awoke in jail except for a nightmare-like experience in which he felt fur flying in his face and saw Lantzy on the floor bleeding from the mouth. He did not recall making any statement to the police.

Both sides presented psychiatric testimony. Doctor Ansley

testified for the defense that Engle had suffered a dissociative reaction as a result of several incidents, including five recent deaths in the family, suicide attempts by Engle and another member of the family and the layoff. Petitioner's drinking

had compounded the problem. Dr. Ansley concluded that from a medical standpoint, Engle was not responsible for his actions.

Dr. Edgar testified, however, that although the defendant was an alcoholic, he had not suffered from dissociative reaction. Dr. Edgar opined that Engle was capable of knowing right from wrong at the time of the killing and had not suffered from an irresistible impulse.

The trial judge instructed the jury as follows on the issues of malice and intent:

> Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicket and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, *malice is implied from any deliberate and cruel act against another person,* however sudden.
>
> Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.
>
> We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any

particular time, *but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts.* It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or

not the wounds were wounds caused by holding the weapon directly against the body of the deceased I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case. Whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt. (Emphasis supplied.)

The court had earlier given general instructions on the presumption of innocence and proof beyond a reasonable doubt. Engle now claims that the above quoted instructions on malice and intent constitute reversible error.

II.

Jury instructions in a criminal case must be evaluated not in isolation, but in the context of the overall charge. *Cupp* v. *Naughten*, 414 U.S. 141 (1973). The Supreme Court has

also held that the charge shall not instruct the jury conclusively or rebuttably to presume the presence of an element of a crime; to do so relieves the state's burden to prove guilt beyond a reasonable doubt. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).[1] The test is whether any "reasonable juror could have given the presumption conclusive or persuasion-shifting effect. . . ." Id. at 519. In *Sandstrom*, the court invalidated an instruction which stated that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Since this language is very similar to that used in the present case, we must evaluate the trial court's instruction in light of *Sandstrom*.

The respondent counters that since Engle did not object to the challenged instructions at trial, he must demonstrate cause and actual prejudice rather than merely showing that a rational

juror might have impermissibly relied upon a presumption. *See Fornash* v. *Marshall*, 686 F.2d 1179 (6th Cir. 1982). *Fornash* is distinguishable, however, because the Michigan courts do not enforce a contemporaneous objection rule against failures to object to *Sandstrom* instructions. *People* v. *Wright*, 408 Mich. 1, 30 n.13 (1980). Consequently, the cause and prejudice analysis of *Fornash* is inapplicable to this case.

III.

The district court held that no rational juror could have believed that the instructions in this case mandated a finding that the petitioner intentionally and maliciously killed Lantzy. The court noted that immediately after the trial judge in-

[1] This circuit has applied *Sandstrom* retroactively. *See, e.g., Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir. 1983).

structed the jury that the law provides "a rule of thumb that a person is presumed to intend the natural consequences of his acts," he listed several items for the jury to consider in deciding whether or not the requisite malice and intent had been proven by the state. Requiring the jury to weigh these factors was held to be inconsistent with the presence of a conclusive presumption. The court further indicated that in order for a juror to have given the challenged instructions conclusive effect, the juror would have had to disregard intoxication and insanity instructions which were relevant to the malice and intent issues. The court therefore held that the instructions in question could not have been interpreted as establishing a conclusive presumption.

What the district court did not recognize, however, is that the challenged instructions reasonably could have been interpreted by the jurors as setting forth a presumption which, while not conclusive, shifted to the defendant the burden of proving the absence of malice and intent. As had been indicated, such burden-shifting presumptions are invalid under *Sandstrom*. *See also Phillips* v. *Rose*, 690 F.2d 79, 81 (6th Cir. 1982).[2]

No. 82-1470 *Engle* v. *Koehler, Warden* 7

The trial court instructed the jury that in Michigan, both malice and intent are elements of first degree murder. The court nevertheless stated that "malice is implied from any

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[2]

The respondent cites *Jacks* v. *Duckworth*, 651 F.2d 480, 485 (7th Cir. 1981), *cert. denied*, 454 U.S. 1147 (1982), which upheld an instruction so long as "any presumption of 'a criminal intent from an unlawful act knowingly done' was rebuttable by 'justifying or excusing facts'." As the dissenting judge in that case pointed out, the Seventh Circuit appears to have approved a burden shifting presumption. To the extent that *Jacks* v. *Duckworth* does so, we decline to follow it.

deliberate and cruel act against another person" and that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts." Since a reasonable juror could have thought that these instructions required findings of malice and intent absent proof to the contrary by the defendant, the instructions are indistinguishable from those invalidated in *Sandstrom*.

The state makes several responses. First, the instructions did not include the phrase "the law presumes" as in *Sandstrom*, but only that the law provides a "rule of thumb." In common parlance, however, a "rule of thumb" is a directive that is generally to be followed, albeit with exceptions. Thus a reasonable juror in this case could have inferred that he was to presume intent unless the defendant proved otherwise. An instruction need not track the precise language of the instruction in *Sandstrom* in order to be invalid. The question is one of burden-shifting effect, not of verbal formulation.

Second, the state argues that any error in the instructions was cured by the general instructions on the presumption of innocence and on proof beyond a reasonable doubt. Furthermore, the trial judge purportedly remedied any error by repeating the beyond a reasonable doubt standard at the end of the malice and intent instructions.

We disagree. The instructions on the presumption of innocence and on proof beyond a reasonable doubt are not rhetorically inconsistent with the existence of a burden-shifting presumption because a reasonable juror could have regarded

the presumptions on malice and intent as "a means by which proof beyond a reasonable doubt . . . could be satisfied." *Sandstrom*, 442 U.S. at 518-19 n.7; *Phillips*, 690 F.2d at 81.

Thus, in evaluating circumstances such as the use of a deadly weapon and the number and location of Lantzy's wounds, the jury may have presumed that absent rebuttal by the defendant, these facts constituted proof beyond a reasonable doubt of malice and intent.

In addition, the set of instructions at issue contained other presumptive language. The trial judge stated that a person is presumed to be of sound mind, is presumed to be sane and responsible for his acts and is presumed to have intended the obscuration of mind which accompanies voluntary intoxication. On the question of dissociative reaction, the court instructed that the presence of such a mental defect constitutes a defense "where this can be proven." While these instructions may have been valid,[3] they nevertheless could have reinforced the notion in the mind of a rational juror that the burden-shifting effect of the malice and intent instructions was proper. *Cf. Phillips*, 690 F.2d at 81 (other malice instructions reinforced the effect of the challenged malice instruction). Viewing the jury charge as a whole, we conclude that the challenged instructions are unacceptable under Sandstrom.[4]

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[3]

Since the validity of these instructions is not before the court, we neither approve nor condemn them.

[4]

The state relies on cases from other circuits such as *Brayboy* v. *Scully*, 695 F.2d 62 (2d Cir. 1982); *Mancuso* v. *Harris*, 677 F.2d 206 (2d Cir. 1982); *Rivera* v. *Coombe*, 683 F.2d 697 (2d Cir. 1982); *Niziolek* v. *Ashe*, 694 F.2d 282 (1st Cir. 1982). The second circuit cases involved intent instructions containing ameliorative or detailed explanatory language. Similar language is not present in the malice and intent instructions at bar. The *Niziolek* intent instruction contains language of permissive inference near the references to presumption, a situation not present here. We express no opinion regarding the correctness of these decisions.

IV.

The final issue for consideration is whether this error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). In the recent case of *Connecticut* v. *Johnson*, 103 S. Ct. 969 (1983), the Court divided equally on the issue of whether instructions held improper under *Sandstrom* could ever be said not to have contributed to the jury's verdict. Four justices favored a traditional harmless error approach while four others would find harmless error only in rare cases (*e.g.*, where the defendant conceded the intent issue). Justice Stevens did not reach the issue. Since the Supreme Court has not supplied clear guidance on this question, we follow the rule in this circuit that *Sandstrom* errors are subject to harmless error analysis. *See, e.g., Company* v. *Anderson*, 698 F.2d 282, 284 (6th Cir 1983).

In *Conway*, this court held that the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea*, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. *See id.* at 285.

This case falls into the latter category. Engle admitted that he killed Lantzy but denied having the requisite *mens rea* to sustain a murder conviction because of the combined effects

of intoxication, the librium pills and mental disease.[5] The evidence concerning these claims was conflicting. For instance, the petitioner and Dr. Ansley testified in a manner supporting the defense of dissociative reaction while Dr. Edgar testified

to the contrary. To some witnesses, Engle appeared calm and coherent near the time of the shooting; to others he appeared to be distraught and possibly under the influence of alcohol. Under these circumstances, we hold that the burden-shifting presumption created by the jury instructions was not harmless.

Accordingly, the judgment is REVERSED and the case is REMANDED to the district court with instructions to grant the writ.

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[5]

This distinguishes the case from both *Krzeminski* v. *Perini*, 614 F.2d 121 (6th Cir.) *cert. denied*, 449 U.S. 866 (1980), in which the defendant admitted the element of "unlawfulness" upon which the erroneous instruction was given and *McGuinn* v. *Crist*, 657 1107 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982), in which the defendant argued alibi rather than lack of intent or malice.